

**Scot Lad Foods, Inc. and Laborers' International
Union of North America, Laborers' Local 1250,
AFL-CIO. Case 6-CA-15019**

March 12, 1982

DECISION AND ORDER

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

Upon a charge filed on October 22, 1981, by Laborers' International Union of North America, Laborers' Local 1250, AFL-CIO, herein called the Union, and duly served on Scot Lad Foods, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 6, issued a complaint on November 9, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on August 6, 1981, following a Board election in Case 6-RC-8909, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;¹ and that, commencing on or about October 7, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 16, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 7, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on December 11, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

¹ Official notice is taken of the record in the representation proceeding, Case 6-RC-8909, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLR Act, as amended.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

The complaint alleges violations of Section 8(a)(1) and (5) of the Act by Respondent's refusal to bargain with the Union since October 7, 1981, on all issues affecting the wages, hours, and other terms and conditions of employment of the employees in the appropriate unit.

In its answer to the complaint and response to the Notice To Show Cause, Respondent admits the refusal to bargain but contends that it was not required to bargain because the Union's certification in the underlying representation case is invalid. Thus, Respondent contends that there exists substantial and material issues arising out of its objections to the election and that they warrant a hearing. Such issues are, according to Respondent, the agency status of Joyce Batson, whether Batson's statements constituted misrepresentations, whether Respondent had an adequate opportunity to respond to Batson's alleged misrepresentations, and whether Batson's conduct was so aggravated as to create an atmosphere of fear of reprisal which rendered a free expression of choice of representation impossible.

A review of the record reveals that, pursuant to a Stipulation for Certification Upon Consent Election in Case 6-RC-8909, an election was held on February 5 and 6, 1981, in the appropriate unit. The tally was 17 for, and 8 against, the Union. There were no challenged ballots. Thereafter, Respondent filed objections to the election. On May 28, 1981, the Regional Director for Region 6 issued his Report and Recommendation on Objections in which he recommended that the objections be overruled, and that a certification of representative be issued. Respondent filed exceptions to the Regional Director's Report and Recommendation on Objections with the Board. On August 6, 1981, the Board issued its Decision and Certification of Representative (not reported in volumes of Board Decisions) in which it adopted the Regional Director's findings and recommendations. In its Decision and Certification of Representative, the Board found that Respondent's exceptions "raise no material or substantial issues of fact or law which would warrant our reversal of the Regional Director's recommendation or require a hearing."

It is well settled that in the absence of newly discovered or previously unavailable evidence or spe-

cial circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.²

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Delaware corporation with an office and place of business located in Hepzibah, West Virginia, has been engaged, at all times material herein, in the nonretail sale of groceries and related products. During the 12-month period ending September 30, 1981, Respondent, in the course and conduct of its operations, sold and shipped from its Hepzibah, West Virginia, facility products, goods, and materials valued in excess of \$50,000 directly to points outside the State of West Virginia. During this same 12-month period, Respondent, in the course and conduct of its operations, purchased and received at its Hepzibah, West Virginia, facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of West Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Laborers' International Union of North America, Laborers' Local 1250, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All office and warehouse clerical employees including procurement clerks, secretaries, order clerks, accounting clerks, data processing operators and keypunchers; excluding all buyers, store counselors, tax accountants, confidential employees, systems analysts, management employees, and guards, professional employees and supervisors as defined in the Act.

2. The certification

On February 5 and 6, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 6, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on August 6, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 2, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 7, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since October 7, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

² See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Scot Lad Foods, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Laborers' International Union of North America, Laborers' Local 1250, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. All office and warehouse clerical employees, including procurement clerks, secretaries, order clerks, accounting clerks, data processing operators, and keypunchers; excluding all buyers, store counselors, tax accountants, confidential employees, systems analysts, management employees, and guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since August 6, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 7, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Scot Lad Foods, Inc., Hepzibah, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Laborers' International Union of North America, Laborers' Local 1250, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

All office and warehouse clerical employees including procurement clerks, secretaries, order clerks, accounting clerks, data processing operators and keypunchers; excluding all buyers, store counselors, tax accountants, confidential employees, systems analysts, management employees, and guards, professional employees and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facility in Hepzibah, West Virginia, copies of the attached notice marked "Appendix."³ Copies of said notice, on forms provided by the Regional Director for Region 6, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Laborers' International Union of North America, Laborers' Local 1250, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All office and warehouse clerical employees including procurement clerks, secretaries, order clerks, accounting clerks, data processing operators and keypunchers; excluding all buyers, store counselors, tax accountants, confidential employees, systems analysts, management employees, and guards, professional employees and supervisors as defined in the Act.

SCOT LAD FOODS, INC.